

In re: CINDY TINSLEY AND REGINALD TINSLEY.

AWA Docket No. 01-0009.

Decision and Order.

Filed March 11, 2002.

**AWA – Missing records – Facility violations – Sanitation violations – Housekeeping violations
– Animal health violations – Transportation of un-weaned puppies prohibited.**

Respondents who owned a dog breeding kennel were charged with multiple violations of the Act occurring over several inspection visits. The Administrative Law Judge (ALJ) found that violations reported by inspector were credible and satisfied criteria to find Respondents in violation of AWA regulations and standards. Respondents made good faith effort to become compliant. Civil penalty and 30 day suspension of license imposed.

Colleen A. Carroll, for Complainant.

Daniel T. Moore, for Respondent.

Decision and Order by Chief, Administrative Law Judge, James W. Hunt.

This proceeding was instituted by a complaint filed on October 24, 2000, by the Administrator, Animal and Plant Health Inspection Service (“APHIS”), United States Department of Agriculture, under the Animal Welfare Act, as amended, 7 U.S.C. § 2131 (“Act”). The complaint alleges that Respondents violated the Act and the regulations (9 C.F.R. § 2.1 *et seq.*) (“regulations”) and the standards (9 C.F.R. § 3.1 *et seq.*) (“standards”) issued under the Act.

A hearing was held on June 20 and 21, 2001, in St. Louis, Missouri. Complainant was represented by Colleen A. Carroll, Esq. Respondents were represented by Daniel T. Moore, Esq.

Law

The complaint alleges that Respondents violated the following regulations and standards:

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor;

....

§ 2.54 Lost tags.

Each dealer or exhibitor shall be held accountable for all official tags acquired. In the event an official tag is lost from a dog or cat while in the possession of a dealer or exhibitor, the dealer or exhibitor shall make a diligent effort to locate and reapply the tag to the proper animal. If the lost tag is not located, the dealer or exhibitor shall affix another official tag to the animal in the manner prescribed in § 2.50, and record the tag number on the official records.

....

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer, other than operators of auction sales and brokers to whom animals are consigned, and each exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

....

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

(v) The date a dog or cat was acquired or disposed of, including by euthanasia;

(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;

(vii) A description of each dog or cat which shall include:

(A) The species and breed or type;

(B) The sex;

(C) The date of birth or approximate age; and

(D) The color and any distinctive markings;

(viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;

(ix) The date and method of disposition of a dog or cat, e.g., sale, death,

euthanasia, or donation.

§ 2.50 Time and method of identification.

(a) A class “A” dealer (breeder) shall identify all live dogs and cats on the premises as follows:

(1) All live dogs and cats held on the premises, purchased, or otherwise acquired, sold or otherwise disposed of, or removed from the premises for delivery to a research facility or exhibitor or to another dealer, or for sale, through an auction sale or to any person for use as a pet, shall be identified by an official tag of the type described in § 2.51 affixed to the animal’s neck by means of a collar made of material generally considered acceptable to pet owners as a means of identifying their pet dogs or cats, or shall be identified by a distinctive and legible tattoo marking acceptable to and approved by the Administrator.

....

(d) Unweaned puppies or kittens need not be individually identified as required by paragraphs (a) and (b) of this section while they are maintained as a litter with their dam in the same primary enclosure, provided the dam has been individually identified.

....

§ 2.130 Minimum age requirements.

No dog or cat shall be delivered by any person to any carrier or intermediate handler for transportation, in commerce, or shall be transported in commerce by any person, except to a registered research facility, unless such dog or cat is at least eight (8) weeks of age and has been weaned.

....

§ 3.1 Housing facilities, general.

(a) *Structure; construction.* Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

(b) *Condition and site.* Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, and stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices and research needs. Housing facilities other than those maintained by research facilities and Federal research facilities must be physically separated from any

other business. If a housing facility is located on the same premises as another business, it must be physically separated from the other business so that animals the size of dogs, skunks, and raccoons are prevented from entering it.

....

(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

....

§ 3.4 Outdoor housing facilities.

....

(b) *Shelter from the elements.* Outdoor facilities for dogs or cats must include one or more shelter structures that are accessible to each animal in each outdoor facility, and that are large enough to allow each animal in the shelter structure to sit, stand, and lie in a normal manner, and to turn about freely. In addition to the shelter structures, one or more separate outside areas of shade must be provided, large enough to contain all the animals at one time and protect them from the direct rays of the sun. Shelters in outdoor facilities for dogs or cats must contain a roof, four sides, and a floor, and must:

....

(2) Provide the dogs and cats with protection from the direct rays of the sun and the direct effect of wind, rain, or snow;

....

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.*

(1) Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be kept in good repair.

(2) Primary enclosures must be constructed and maintained so that they:

(i) Have no sharp points or edges that could injure the dogs and cats;

(ii) Protect the dogs and cats from injury;

(iii) Contain the dogs and cats securely;

....

(c) *Additional requirements for dogs-*

(1) *Space.* (i) Each dog housed in a primary enclosure (including weaned puppies) must be provided a minimum amount of floor space, calculated as follows: Find the mathematical square of the sum of the length of the dog in inches (measured from the tip of its nose to the base of its tail) plus 6 inches; then divide the product by 144. The calculation is: (length of dog in inches + 6) x (length of dog in inches + 6) = required floor space in square inches. Required floor space in inches/144 = required floor space in square feet.

....

§ 3.9 Feeding.

....

(b) Food receptacles must be used for dogs and cats, must be readily accessible to all dogs and cats, and must be located so as to minimize contamination by excreta and pests, and be protected from rain and snow. Feeding pans must either be made of a durable material that can be easily cleaned and sanitized or be disposable. If the food receptacles are not disposable, they must be kept clean and must be sanitized in accordance with § 3.11(b) of this subpart. Sanitation is achieved by using one of the methods described in § 3.11(b)(3) of this subpart. If the food receptacles are disposable, they must be discarded after one use. Self-feeders may be used for the feeding of dry food. If self-feeders are used, they must be kept clean and must be sanitized in accordance with § 3.11(b) of this subpart. Measures must be taken to ensure that there is no molding, deterioration, and caking of feed.

....

§ 3.11 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough

to ensure the animals would not be harmed, wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with wire or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards, pests, insects and odors.

(b) *Sanitization of primary enclosures and food and water receptacles.* (1) Used primary enclosures and food and water receptacles must be cleaned and sanitized in accordance with this section before they can be used to house, feed, or water another dog or cat, or social grouping of dogs and cats.

(2) Used primary enclosures and food and water receptacles for dogs and cats must be sanitized at least once every 2 weeks using one of the methods prescribed in paragraph (b)(3) of this section, and more often if necessary to prevent an accumulation of dirt, debris, food waste, excreta, and other disease hazards.

....

(c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.

(d) *Pest control.* An effective program for the control of insects, external parasites affecting dogs and cats, and birds and mammals that are pests, must be established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.

Statement of the Case

Respondents Cindy Tinsley and Reginald Tinsley own and operate a kennel at RR 6, Box 1147, Poplar Bluff, Missouri 63901. They have been breeding and selling dogs to dealers for ten years. They hold APHIS dealer license number 43-A-2148. The kennel averages about 80 adult dogs and 20 puppies. (Tr. 221, 230; CX 1.)

The alleged violations are based on the following six APHIS inspections of Respondents' facility: June 1 and November 23, 1998; May 24 and December 27, 1999; and May 23 and August 17, 2000.

The report for the inspection on June 1, 1998, does not indicate when the facility

had previously been inspected, but stated that six items that had been identified at the previous inspection as not being in compliance with the regulations or standards had been corrected. However, it also stated that a non-compliant item relating to adequate shade for the animals had not been corrected. The report further stated that four new items had been identified as not being in compliance with the regulations or standards. These concerned the failure to completely fill out records on the disposition of animals (section 2.75(a)); the failure to remove unnecessary items from the tops of enclosures (section 3.11(c)); the failure to establish an effective program of rodent control (section 3.11(d)); and the failure to clean a feeder to remove moldy feed (section 3.9(b)). (CX 2.)

James Depue, the APHIS animal care inspector who had conducted the inspection and prepared the report, testified that 21 dogs did not have shade over their outdoor runs. (Tr. 102.) Respondent Carol Tinsley said that the sunscreen was damaged by a storm and that the animals had access to shade in their dog house. (Tr. 249.) Section 3.4(b) requires that outside areas provide dogs with protection from the direct rays of the sun. I find that Respondents violated section 3.4(b) by not providing outside shade for their animals.

James Depue testified that the kennel's records were deficient because some did not show the dog breed or date of disposition, the animals' destination, the method of transportation, and the name and address of the buyer. (Tr. 98, 130-132, 167.)

Respondents argue that the regulations only require that records be kept of the name and address of the buyer; that Depue did not have any documents to substantiate his findings; and that Respondents corrected the deficiency. Section 2.75(a)(1) of the regulations, however, requires all the information that Depue found to be lacking, his testimony was credible without the need for substantiating documents, and a respondent violates the Act and regulations even though it later corrects the deficiency. *Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996). Accordingly, I find that Respondent violated section 2.75(a)(1) of the regulations.

Depue testified that the failure to remove unnecessary items from the tops of enclosures was a housekeeping problem and that these items included used syringes and needles, discarded bottles, carpet squares "and things like that." (Tr. 100.) Respondents argue that some items stored on top of enclosures, such as heating units and insect spray, were necessary for the operation of the kennel. Carol Tinsley said adult dogs prefer air conditioning (half the facility is air conditioned; while the other half has fans), while the pups prefer the warmth of the heating pads. (Tr. 229, 248.) However, she did not claim that the items specifically identified by Depue were necessary. (Respondents' brief, p. 5.) I find that even though the heating pads were a necessary part of the kennel operation, the storage of other unnecessary clutter in the enclosure was a violation of section 3.11(c).

With respect to rodent control, Depue testified that he could tell there was an inadequate program of rodent control because he saw rodent droppings and could

detect their odor. (Tr. 100.) Carol Tinsley admitted that there were mice but said that she kept them under control with D-Con. (Tr. 248.) Section 3.11(d) of the standards require pest control programs to promote the health and well-being of animals and reduce the contamination of pests. While there may have been rodents, Complainant has not shown by a preponderance of the evidence that the facility was contaminated with them or that Respondents' program failed to promote the health and well-being of its animals. I therefore do not find a violation of section 3.11(d).

Depue stated that the mold in the dog feeder was evidently due to moisture getting in the feed. (Tr. 102.) Respondents state that rain on the day of the inspection had gotten into the dog dishes and that, while the food may have been wet and caked, it was not moldy. (Tr. 249, 313.) Section 3.9(b) requires that food be protected from rain and from caking as well as prohibiting mold. Respondents thus violated section 3.9(b) regardless of whether the food was moldy.

James Depue conducted the next inspection on November 23, 1998. He found that the feeders had been cleaned and that the problem of shade for the animals had been corrected, but that the facility was still non-compliant in regard to recordkeeping and housekeeping. New non-compliant items he identified were: One animal did not have the required amount of floor space and head room (section 3.6(c)), or adequate exercise room (section 3.8); and holes in enclosures needed to be repaired (section 3.6(a)(2)(iii)). (CX 3.)

Depue said, concerning the recordkeeping requirement, that there had been a fire at Respondents' house which destroyed their records. The complaint does not allege that the lack of records in this circumstance was a violation.

With respect to housekeeping, Depue did not specify the nature of the deficiency other than to say that "things" were stored on top of enclosures "instead of being put away properly and orderly." (Tr. 107.) Section 3.11(c) requires that "Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter." Complainant has not shown that the "things" Depue saw at the facility met this definition. I therefore do not find this to be a violation.

With respect to the alleged failure to provide dogs with adequate floor space, head space, and exercise room, section 3.6(c)(1)(i) of the standards is precise concerning the mathematical formula to use to determine the amount of required space. Section 3.8(c) relating to exercise space is predicated on the measurements in section 3.6(c)(1)(i). Depue, however, used his hand rather than a measuring device to estimate the space and even then did not provide any measurement figures, other than to say the space was inadequate. (Tr. 108-109, 169.) I find this imprecise method of measurement not to be substantial evidence for purposes of establishing a violation of the standards.

Depue said the holes in a shelter were due to the wood rotting and chewing by the animals. (Tr. 109.) Respondents do not deny that there were holes in the shelter. Section 3.6(a)(2)(iii) requires that enclosures contain animals securely. A hole, in itself, would not necessarily affect the security of the dogs, but rot would.

I therefore find the rot to be a violation of section 3.6(a)(2)(iii).

Depue's report for his inspection on May 24, 1999, indicates that all non-compliant items had been corrected from the previous inspection except for recordkeeping. He also found two new non-compliant items: Dogs below the minimum age requirement were transported (section 2.130) and tags were lost (section 2.54). (CX 4.)

DePue testified that records "were not completely filled out" concerning the identification number for 17 dogs acquired by the kennel and the source of their acquisition. He also indicated that records were incomplete concerning the disposition of 24 animals, but his testimony is vague on exactly what information was lacking. (Tr. 103-104.) Nevertheless, to the extent Respondents failed to identify the source of the acquired dogs there was a violation of section 2.75(a)(1).

Depue testified that Respondents transported puppies under the age of eight weeks. (Tr. 110.) Section 2.130 prohibits the transportation of puppies under that age. Carol Tinsley admitted that the puppies were three weeks old when they were transported, but said she had bought the mother dog before it gave birth and that the puppies, with a veterinarian's approval, had to be transported before the required age because the former owner was moving to a new location. (Tr. 261.) These may be extenuating circumstance, but transporting dogs less than eight weeks of age is nevertheless a violation of the specific requirement of section 2.130.

Depue said that dogs had lost their tags. (Tr. 112.) Tinsley testified that the dogs were puppies which were still with their mother and had not yet been tagged. (Tr. 262.) Section 2.50(d) provides that unweaned puppies do not have to be individually identified. I find that Complainant has not shown by a preponderance of the evidence that Respondents violated section 2.54.

Depue's report for his inspection on December 27, 1999, states that the non-compliant items relating to transporting underage puppies and the records on the disposition of dogs had been corrected, but that the records relating to the acquisition of dogs, including dog identification numbers, and dog tags were still not in compliance. He also found that Respondents were not compliant with the housekeeping requirement. (CX 5.)

Depue testified that the kennel's records on dog acquisitions did not include the animals' identification number as required by section 2.75(a). (Tr. 105.) Section 2.75(a)(1)(vi), however, does not refer to identification numbers, but to tag numbers. Depue was apparently not referring to tag numbers since he cited Respondents separately for failing to replace missing tags for 18 dogs as required by section 2.54. Respondents state that when told of the missing tags they replaced them. I find that the failure to have tags for the dogs was a violation of section 2.54 but that there was no violation of section 2.75(a) since it does not require identification of dogs apart from tags.

As for the alleged housekeeping deficiency, Depue testified that there was excessive fecal and food waste in one enclosure. (Tr. 113.) Respondents do not

deny the allegation but state that the waste was cleaned the same day. The excessive waste was a violation of section 3.11(a) even though corrected.

The report for an inspection on May 23, 2000, states that the non-compliant items relating to acquisition records and lost tags had been corrected, but that the problem with waste accumulation continued. He also found three new items of non-compliance: Insufficient shade (section 3.4(b)(2)); a lack of a veterinary care program (section 2.40(b)); and a need to remove clutter (section 3.1(b)). (CX 6.)

Depue said he found waste accumulation at this inspection but in a different enclosure. (Tr. 114.) The failure to clean accumulated waste is a violation of section 3.11(a). Depue said that outdoor runs did not provide shade for 32 dogs. (Tr. 115.) Respondents argue that the temperature on the inspection day was not as high as Depue had claimed and that hairless dog breeds "like the warmth of the sun." (Respondents' Brief, p. 19.) Be that as it may, the standards still require shade and none was provided. This was a violation of section 3.4(b)(2).

Depue testified that he was told that the kennel had changed veterinarians but that it had no program of veterinary care as required by section 2.40 and that an attending veterinarian had not visited the facility in a year and a half. He said a veterinarian should visit the facility at least once a year. (Tr. 115-116.) Carol Tinsley testified that the veterinary care program had expired in November 1999 when the veterinarian for the kennel retired, but that she had not realized the facility lacked a program by the new veterinarian until Depue brought it to her attention at the May 2000 inspection. She said that, despite the lack of a written program, the animals received regular veterinary care. She provided copies of receipts for veterinary services that her dogs received in March and April 2000. (Tr. 270, 327; RX 15.) Section 2.40 specifically requires a written program of veterinary care including regularly scheduled visits by the attending veterinarian. The failure to have a veterinary care program and to have regularly scheduled visits from a veterinarian is a violation of section 2.40.

Depue said the non-compliance with the cleaning requirement of section 3.1(b) was the "general cleaning problem, again to removed [sic] clutter, wood and discarded items." (Tr. 116-119.) He took pictures of the alleged clutter. (CX 8a, 8b and 8c.) Respondents state that the kennel was in the process of being renovated, that it had obtained Depue's approval to store building material in the enclosure, and that the photographs show cement, a caulking tube, plywood, and barrels that are used in the dog runs. (Tr. 241.) Section 3.1(b) provides that an enclosure must be kept "neat and free of clutter" but goes on to make an exception for the storage in the housing facility of "materials actually used and necessary for cleaning the area and fixtures or equipment necessary for proper husbandry practices and research needs." The photograph in CX 8b does appear to show what may be building material (open cement bag), and the photograph in CX 8c also shows a used caulking tube, a part of a shovel, two cans of an unidentifiable substance and an assortment of what is obviously trash. Depue said that this clutter,

which included what he said was something “like a horse halter,” was placed on top of a dog house. (Tr. 119.) Even though some of the material may have been used for husbandry purposes, Complainant has established by a preponderance of the evidence that other unnecessary clutter was placed in the animal enclosure in violation of section 3.1(b).

Depue conducted his last inspection on August 17, 2000. He was accompanied by Michael Ray, an APHIS field investigator, and John Slauter, an APHIS veterinary medical officer. The inspection report states that Respondents had corrected the deficiencies concerning shade for the animals, clutter, veterinary care program, and waste accumulation. However, eight new non-compliant items were identified: Outdoor runs needed to be cleaned and sanitized (section 3.11(b)); five animals required veterinary care (section 2.40(b)); repairs were needed for enclosures (section 3.6(a)(2)(i)); waste drainage pipe was clogged (section 3.1(f)); water bowl needed to be sanitized (section 3.11(b)); self-feeders were rusty and worn and needed to be sanitized (section 3.9(b)); storage area in shelter needed to be cleaned (section 3.1(b)); and housing facilities were not kept in proper repair (section 3.1(a)). (CX 10.)

Michael Ray, the field investigator, testified that he saw dried animal waste that was more than twenty-four hours old smashed into the concrete on the outdoor dog runs. (Tr. 36.) Dr. Slauter testified that the outdoor run, used by 66 dogs (Tr. 122), had not been cleaned and sanitized on a regular basis. He said cleaning involves removing fecal material, while sanitizing involves scrubbing the area with soap and water and a disinfectant. Photographs taken at the time show even to a layman the excessive accumulation of fecal waste. Dr. Slauter further said that he asked Ms. Tinsley about sanitizing and she replied that she had not sanitized in the past two weeks. (Tr. 54-56; CX 11a, 11b, 11c, and 11d.) Tinsley said she starts work at an outside job at 6:45 a.m. and starts her care of the kennel at 5:30 p.m. Her husband starts working at the kennel between 3 and 4 p.m. after he finishes his job for the day. They have no other help. She said they scrape and hose the kennel daily. (Tr. 311.) The testimony of Ray and Slauter show that, regardless of whatever cleaning the Tinsleys’ performed at the kennel, it was insufficient to meet the requirements of section 3.11(a) and (b) that enclosures be cleaned as necessary to prevent an excessive build up of waste and that they be sanitized at least every two weeks.

Dr. Slauter testified that he observed three dogs with eye infections and two with excessive hair mats. He said that, apart from these five animals, the other 92 dogs at the facility were overall in good condition. Photographs taken by Michael Ray (CX 12b, 12c) shows two dogs with crusts around their eyes with one of the dogs (CX 12b) appearing to have excessive ocular discharge. Although Dr. Slauter did not personally examine the animals he estimated that the dog with the discharge had the condition for a week or more. He said the animals needed to be looked at by the attending veterinarian. Carol Tinsley said she treated the dog with eye wash and an antibiotic prescribed by her veterinarian. However, she said the veterinarian had

not seen the dog. (Tr. 267, 305-308.) Jerry Eber, a veterinarian with the Missouri Department of Agriculture, agreed that the dog was in need of immediate veterinary care. (Tr. 209.) Respondents contend that since Dr. Slauter did not examine the animal he could not diagnose its condition. However, it was not for Dr. Slauter to determine the cause of an animal's ailment; it was his function to determine whether it received veterinary care. It was then Respondents' responsibility as a licensed dealer to provide veterinary care, including diagnosis and appropriate treatment. Respondents failure to provide veterinary care is a violation of section 2.40.

Dr. Slauter said that wires with sharp points protruding into an enclosure constituted a danger to a dog's legs or eyes. Depue also testified that the partition wire between two pens was unattached. (Tr. 56-58, 125-126; CX 18.) Even though Respondents contend that the wires were repaired, the occurrence of protruding and unattached wires was a violation of sections 3.1(a) and 3.6(a)(2)(i)(ii).

Depue testified that a waste drainage pipe had gotten clogged and overflowed. (Tr. 123.) Dr. Slauter said that because of improper drainage waste material did not flow away from the kennel. (Tr. 59.) This constitutes a violation of section 3.1(f) which requires that "all drains must be properly constructed, installed and maintained."

With respect to the report's finding of non-compliance concerning alleged moldy water bowls and rusty feeders, Depue said the water bowls had algae and needed to be cleaned. (Tr. 123.) The complaint, however, does not allege that this was a violation. Carol Tinsley said the rusty containers were not being used as feeders and investigator Ray also testified that they were not being used for that purpose. (Tr. 25, 236.) As the containers were not being used as feeders, there was no violation.

Dr. Slauter testified that the storage area was in "total disarray" and that it was "not good housekeeping." He said he saw a "feed bag" and "a bottle of something." (Tr. 63, 78; CX 17.) James Depue also said that storage was in disarray. (Tr. 124; CX 17.) Carol Tinsley testified that Complainant's photograph of the bags (CX 17) showed one bag containing cedar chips that were used under the hutches and the other sack was an empty feed bag that she used when she cleaned the facility. She said the container was bleach, which is used as a disinfectant. (Tr. 236.) Respondents violated section 3.1(b) to the extent of not keeping materials in the housing storage area in a neat condition.

Complainant has not conducted any inspections of the kennel since August 2000. Respondents, which are also licensed by the state of Missouri, were inspected in June 2001 by Jerry Eber, a veterinarian with the Missouri Department of Agriculture. He testified that he found some cracks in the cement, wind damage to a dog house, plastic pans that had been chewed, and an enclosure that needed a rain gutter. He said "the overall health and condition of the dogs was fine." (Tr. 197, 218.)

Carol Tinsley testified that she takes good care of her animals and said the

facility has corrected its deficiencies since the August 2000 inspection. She presented various exhibits to support this contention, including photographs of the kennel, a new power washer, records of veterinary care and two written veterinary care programs dated January 1 and June 5, 2001. (Tr. 284; RX 1-15.) The veterinary care programs contain the names of the kennel's current veterinarian, Dr. Catherine Hicks. (RX 1-2.)

Complainant contends that Dr. Hicks' signatures on the two programs are forgeries and, to support its contention, offered transparent overlays as attachments to its brief to compare the signatures. Carol Tinsley denied any forgery. She said she had left the forms at Dr. Hicks' office on separate occasions and did not know the actual dates they were signed by the doctor. (Tr. 328.)

"[P]ersons skilled in a knowledge of handwriting are permitted to give their opinions as to whether the particular handwriting on the instrument alleged to be forged is genuine . . ." 95 Am. Jur. 2D *Forgery* §50. Complainant had received copies of the veterinary care programs with the alleged forgeries (RX 1-2) prior to the hearing, but did not present any persons skilled in handwriting as witnesses to testify at the hearing on whether Dr. Hicks' signatures were authentic. (Tr. 291-292.) The evidence is insufficient to show that [] RX 1 and 2 contained forged signatures.

As the penalty for the violations, Complainant seeks revocation of Respondents' license:

The revocation is warranted based on respondents' repeated failure to comply with the Regulations and Standards, unwillingness to acknowledge or correct repeated deficiencies, and falsification of documents. Respondents have repeatedly failed to take steps necessary to ensure the animals' well-being, including following the most basic of animal husbandry practices, such as cleaning their enclosures. Respondents appear unable to modify their own practices in order to meet the minimum standards required of licensed animal dealers.

Section 2149(b) of the Animal Welfare Act (7 U.S.C. § 2149(b) provides that:

The Secretary [of Agriculture] shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

The Secretary's sanction policy is that:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate

weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Richard Lawson, et al., d/b/a Noah's Ark Zoo, 57 Agric. Dec. 980, 1012 (1998)

The Animal Welfare Act states that its purpose is to provide animals with humane care and treatment (7 U.S.C. § 2131). Dr. Eber testified that the overall health and condition of the animals was fine. (Tr. 197.) Dr. Slauter also testified that, apart from the dogs with an eye condition and those with matted hair, the animals overall were in good condition. (Tr. 41-42.) Even when the facility lacked a veterinary care program and missed an annual visit by a veterinarian, the animals were still provided with medical care. Still, even though the animals may generally have been treated humanely, their well-being could also be adversely affected by such conditions as a lack of proper housekeeping, accumulated fecal material, and inadequate waste drainage, which can harbor pests and pose a health risk to the animals. These deficiencies, as Depue noted, often recurred. (Tr. 95-96.)

Complainant, in seeking license revocation, contends that the deficiencies are due to the inability and/or unwillingness of Respondents to comply with animal care requirements. Dr. Slauter, however, did not go that far. Rather, he suggested that he believed the facility could come into compliance:

Q. And Dr. Slauter, based on your inspection and visit, albeit once, to Ms. Tinsley's facility, do you have an opinion as to Mr. Tinsley's and Ms. Tinsley's ability to come into compliance?

A. To be very honest, I've shared this before with -- when I walked away from the kennel, I felt with a lot of work, some effort, a lot of repairs, the kennel was capable of working.

It was a very old facility, clearly. I thought the potential was there, just meeting Ms. Tinsley, and talking with her, for her to comply. I was hopeful that [] would be the case, very hopeful.

Q. And did you -- do you have any opinion as to whether the Respondents are willing to do the things that you were just discussing?

A. Having been there one time, I really don't have a good reading of that. She did express to us, a willingness to correct what needed to be corrected.

(Tr. 69-70.)

James Depue's testimony on this point occurred in the following context:

Q. Okay. And on the occasions that you have inspected at Mr. and Ms.

Tinsley's facility, has Ms. Tinsley evidenced to you an intention -- or ability to correct the problems that you described to her?

A. An intention or ability?

Q. Either.

A. I think that there is always an intention. I can't -- I don't think that I can judge on ability.

There does seem to be chronic problems. I don't know if it is a lack of ability, lack of funds, or what the problem is.

(Tr. 127-128.)

The testimony of Dr. Slauter and James Depue thus do not establish that non-compliance is due to Respondents' unwillingness or inability to comply. Respondents, on the other hand, indicate that they are willing and able to comply and contend that they have improved the facility since the last inspection. There have been instances of recurring violations, but there have also been corrections. Corrections of violations may be taken into account when determining the sanction to impose. *Susan DeFrancesco and East Coast Exotics, Inc.*, 59 Agric. Dec. 97, 112 (2000). APHIS has not conducted any inspections since the last inspection on August 17, 2000, concerning the extent to which Respondents may have improved the facility.

As for the opinion of an enforcement official on an appropriate penalty, Robert Gibbens, an APHIS veterinary medical officer and director for the enforcement of the Animal Welfare Act in all western states, testified that, based on his review of Respondents' file, he believed for "something like this, we would seek something like a 30 day suspension. But they would have to demonstrate compliance after that period, before the license would become valid again." (Tr. 185.)

Considering all the circumstances in this case, including the purpose of the Act, the nature of the violations, their recurrence, the corrections that Respondents have attempted, and the opinion of Dr. Gibbens, I find that a 30-day suspension of Respondents' license and a three thousand dollar penalty is appropriate. As noted by Dr. Gibbens, Respondents must demonstrate compliance before their license is restored. (9 C.F.R. §§ 2.10, 2.11(a)(2) and (3).)

Findings of Fact

1. Respondents Cindy Tinsley and Reginald Tinsley own and operate a kennel at RR 6, Box 1147, Poplar Bluff, Missouri 63901. At all times relevant to this

proceeding Respondents were operating as a dealer under the Animal Welfare Act pursuant to APHIS AWA license no. 43-A-2148.

2. APHIS conducted inspections of Respondents' facility on June 1 and November 23, 1998; May 24 and December 27, 1999; and May 23 and August 17, 2000.

3. On June 1, 1998, Respondents' records on dog dispositions did not contain information on the dog breeds, dates sold, dates of disposition, their destinations, their methods of transportation, and the names and addresses of the animals' buyers.

4. On June 1, 1998, Respondents stored used and discarded material in animal enclosures.

5. On June 1, 1998, Respondents allowed rain to cause animal food to become wet and caked.

6. On June 1, 1998, Respondents did not provide shade for dogs in outdoor runs.

7. On November 23, 1999, the walls of the animal enclosures in Respondents' facility contained holes caused by rot.

8. On May 24, 1999, Respondents allowed dogs under the age of eight weeks to be transported.

9. On May 24, 1999, Respondents' records did not show the source for acquired dogs.

10. On December 27, 1999, dog enclosures at Respondents' facility contained excessive accumulations of fecal and waste material.

11. On December 27, 1999, Respondents had not replaced missing dog tags.

12. On May 23, 2000, outside dog runs at Respondents' facility did not provide dogs with shade.

13. On May 23, 1999, Respondents did not have a program of veterinary care.

14. On May 23, 2000, an animal enclosure at Respondents' facility was cluttered with unnecessary items.

15. On May 23, 2000, an animal enclosure at Respondents' facility contained an excessive accumulation of waste.

16. On August 17, 2000, Respondents did not provide dogs with proper veterinary care.

17. On August 17, 2000, wires in animal enclosures at Respondents' facility protruded into animal living space and had sharp points.

18. On August 17, 2000, waste material at Respondents' facility did not drain properly from the enclosures.

19. On August 17, 2000, dog runs at Respondents' facility contained an excessive accumulation of waste material and lacked proper sanitization.

20. On August 17, 2000, a storage area at Respondents' facility was in disarray.

Conclusions of Law

Respondents Carol Tinsley and Reginald Tinsley violated the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*, the regulations, 9 C.F.R. § 2.1 *et seq.*, and the standards, 9 C.F.R. § 3.1 *et seq.*, issued under the Act, as follows:

1. On June 1, 1998, Respondents failed to maintain complete records showing the disposition and identification of animals in violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75 (a)(1)).

2. On June 1, 1998, Respondents violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards as specified below:

a. Dogs in outdoor housing facilities were not provided with adequate protection from the elements in violation of 9 C.F.R. § 3.4(b);

b. Food receptacles for dogs were not kept clean in violation of 9 C.F.R. § 3.4(b);

c. The premises were not kept clean and free of trash, junk, waste, and discarded matter, in order to protect the animals from injury and facilitate the required husbandry practices in violation of 9 C.F.R. § 3.11(c).

3. On November 23, 1998, Respondents failed to maintain primary enclosures for dogs so that they contained the animals securely in violation of 9 C.F.R. § 3.6(a)(2)(iii).

4. On May 24, 1999, Respondents transported dogs which were not at least eight weeks of age in violation of 9 C.F.R. § 2.130.

5. On May 24, 1999, Respondents failed to maintain complete records showing the identification of animals in violation of section 10 of the Act (7 U.S.C. § 2140) and 9 C.F.R. § 2.75(a)(1).

6. On December 27, 1999, Respondents failed to replace lost identification tags in violation of 9 C.F.R. § 2.54.

7. On December 27, 1999, Respondents failed to keep primary enclosures for dogs clean and sanitized in violation of 9 C.F.R. §§ 3.11(a) and (b).

8. On May 23, 2000, Respondents failed to maintain written programs of veterinary care in violation of 9 C.F.R. § 2.40.

9. On May 23, 2000, Respondents violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

a. Animal areas inside of housing facilities were not kept neat and free of clutter in violation of 9 C.F.R. § 3.1(b);

b. Dogs in outdoor housing facilities were not provided with adequate protection from the elements in violation of 9 C.F.R. § 3.4(b);

c. Primary enclosures for dogs were not kept clean and sanitized in violation of 9 C.F.R. § 3.11(a);

10. On August 17, 2000, Respondents failed to provide needed veterinary treatment to dogs in need of care in violation of 9 C.F.R. § 2.40.

11. On August 17, 2000, Respondents violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

a. Housing facilities for dogs were not maintained in good repair in

violation of 9 C.F.R. § 3.1(a).

b. Animal areas in the housing facility were not kept in a neat condition in violation of 9 C.F.R. § 3.1(b).

c. Housing facilities were not maintained so that animal waste and water were rapidly eliminated in violation of 9 C.F.R. § 3.1(f).

d. Primary enclosures for dogs were not constructed and maintained in good repair so that they have no sharp points in violation of 9 C.F.R. § 3.6(a)(2)(i).

e. Primary enclosures for dogs were not kept clean and sanitized in violation of 9 C.F.R. §§ 3.11(a) and (b).

Order

1. Respondents Carol Tinsley and Reginald Tinsley are jointly and severally assessed a penalty of \$3,000. The penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded within 35 days of service of this Order to:

Colleen A. Carroll, Esq.
Office of the General Counsel
Marketing Division
Room 2343 South Building
U.S. Department of Agriculture
Washington, DC 20250

2. Respondents' license under the Animal Welfare Act is hereby suspended for 30 days and thereafter until their facility is found by APHIS to be in compliance with the Act and the regulations and standards promulgated thereunder.

3. Respondents, their agents and employees, successors and assigns directly or through any corporate or other device shall cease and desist from:

(a) Failing to maintain complete records of the acquisition, disposition, description, and identification of animals;

(b) Failing to provide for the maintenance of the elimination of waste drainage from animal housing facilities;

(c) Moving dogs under the age of eight weeks of age;

(d) Failing to keep the premises clean and neat and in repair and free of accumulations of trash, junk, waste, and discarded material;

(e) Failing to replace missing dog tags;

(f) Failing to provide animals in outdoor runs with protection from the direct rays of the sun;

(g) Failing to clean animal enclosures as necessary of excessive accumulations of fecal and waste material;

(h) Failing to sanitize enclosures at least every two weeks;

(i) Failing to maintain housing facilities for animals that are structurally

sound and in good repair in order to protect the animals from injury and contain them securely;

(j) Failing to develop and maintain written programs of veterinary care;

(k) Failing to provide animals with prompt veterinary care.

Pursuant to the Rules of Practice, this Decision and Order will become final without further proceedings 35 days after service upon Respondents unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days after service pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).
